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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MORRIS KURTZ,

Defendant and Appellant.

H043729

(Santa Clara County

Super. Ct. No. 214981)

Defendant Morris Kurtz entered a no contest plea to possession for sale of a controlled substance, possession of ammunition by a convicted felon, and possession of a nunchaku. He also admitted two prison prior enhancements. The court sentenced him to serve a two-year prison term, consecutive to a nine-year sentence he was serving in a case filed in Alameda County.

Defendant on appeal challenges the court's imposition of penalty assessments on two levies made by the court. The two levies were a criminal laboratory analysis fee (see Health & Saf. Code, § 11372.5; hereafter crime-lab fee),<sup>1</sup> and a drug program fee (see § 11372.7). He argues that the crime-lab fee and drug program fee constituted administrative fees upon

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<sup>1</sup> All further statutory references are to the Health and Safety Code unless otherwise stated.

which the imposition of penalty assessments was improper. We conclude there was no error and will affirm the judgment.

### FACTS

In the early hours of April 3, 2013, Officer Brad Rice of the Campbell Police Department, who at the time was a member of a Department of Justice task force investigating narcotics, along with other peace officers, executed a search warrant at an apartment in San Jose. Officers arrived in a bulletproof truck and called out on a loudspeaker repeatedly for the occupants of unit number four to exit the building with their hands up. Defendant came out the front door, looked outside in the direction of the officers' truck, and returned inside the building. Defendant, and then his girlfriend, Adrian Mueller, later exited the building.

In executing the search warrant, officers discovered several plastic baggies of suspected narcotics in various parts of the apartment unit, and a metal container of suspected residual methamphetamine in a safe that the officers forced open. The search also yielded \$300 cash in a dresser, two pairs of nunchucks, two digital scales containing a white residue, empty plastic baggies labeled "G" for one gram and "Q" for one-quarter ounce, seven throwing stars and metal knuckles, .38-caliber rounds of ammunition, and miscellaneous drug paraphernalia. A chemist from the Santa Clara County Crime Laboratory determined that the suspected controlled substances obtained during execution of the search warrant constituted approximately 14 grams of crystalline methamphetamine.

When he was later interviewed by Officer Rice, defendant admitted that he used narcotics but stated he did not sell them. Mueller told the police that she had been present in the apartment at least 20 times when defendant sold methamphetamine to others.

### PROCEDURAL BACKGROUND

Defendant was charged in a five-count indictment filed September 28, 2015, with possession for sale of a controlled substance, methamphetamine (§ 11378; count 1), possession of metal knuckles (Pen. Code, § 21810; count 2), possession of a shuriken

(Pen. Code, § 22410; count 3), possession of ammunition by a person previously convicted of a felony (Pen. Code, § 30305, subd. (a)(1); count 4), and possession of a nunchaku (Pen. Code, § 22010; count 5).<sup>2</sup> It was alleged further in the indictment that defendant had suffered three prison priors (Pen. Code, § 667.5, subd. (b)).

On March 7, 2016, defendant pleaded no contest to counts 1, 4, and 5, and admitted two prison priors. On May 20, 2016, the court sentenced defendant to an aggregate two-year prison term, consecutive to a nine-year sentence he was serving arising out of Alameda County case number H54583B. The court dismissed counts 2 and 3, and one of the prison priors in the interests of justice, and struck the additional punishment associated with the two admitted prison priors pursuant to Penal Code section 1385. Additionally, the court imposed (1) a crime-lab fee of \$50 pursuant to section 11372.5, (2) penalty assessments of \$155 on that fee, (3) a drug program fee of \$150 pursuant to section 11372.7, and (4) penalty assessments of \$465 on that fee. Defendant filed a timely notice of appeal.<sup>3</sup>

### DISCUSSION

Defendant contends that the court erred in imposing penalty assessments of \$155 and \$465 upon the crime lab and drug program fees, respectively. Specifically, he argues that because penalty assessments typically apply only to a “fine, penalty, or forfeiture” (Pen. Code, § 1464, subd. (a)(1); Gov. Code, § 76000, subd. (a)(1)), but not to fees (see *People v. Watts* (2016) 2 Cal.App.5th 223, 228, 234-235 (*Watts*)), assessments on crime-lab and drug program fees are improper because they are, indeed, fees. Although he relies on *People v. Vega* (2005) 130 Cal.App.4th 183 (*Vega*) and *Watts, supra*, 2 Cal.App.5th 223, he

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<sup>2</sup> The indictment also named Donald Harbaugh as a defendant, alleging one count of possession for sale of a controlled substance, amphetamine (§ 11378).

<sup>3</sup> After defendant filed this appeal, on March 1, 2017, the clerk of the superior court filed a Request for Action containing a minute order signed by the trial judge stating, among other things, that the court would take no action with respect to defense counsel’s prior request [of January 14, 2017] to strike the penalty assessments imposed on the crime-lab fee and drug program fee.

acknowledges that there is authority dating back approximately 20 years upholding the propriety of imposing penalty assessments on the fees at issue here. (See *People v. Martinez* (1998) 65 Cal.App.4th 1511 (*Martinez*) [crime-lab fee]; *People v. Sierra* (1995) 37 Cal.App.4th 1690 (*Sierra*) [drug program fee].)

In *Sierra*, the Fifth District Court of Appeal upheld the imposition of a penalty assessment on a drug program fee imposed pursuant to section 11372.7.<sup>4</sup> It rejected the defendant's claim that the fee was "a *specific* fee created by the Legislature for a *specific* purpose and from the language of the statute [was] imposed in addition to a base fine." (*Sierra, supra*, 37 Cal.App.4th at p. 1695, original italics.) The *Sierra* court pointed out that while the language of section 11372.7, subdivision (a) (§ 11372.7(a)) initially refers to the drug program levy as a "fee"—i.e., "each person who is convicted of a violation of this chapter shall pay a drug program fee"—"the very sentence [the defendant] attempts to interpret defines the drug program fee as an increase to the 'total fine' and later as a fine in addition 'to any *other penalty*.' . . . In other words, section 11372.7, subdivision (a) describes itself as both a fine and/or a penalty." (*Sierra*, at p. 1695, original italics.) Rejecting the defendant's interpretation of the statute as providing for the imposition of a fee upon which a penalty assessment was prohibited, the *Sierra* court reasoned: "[The defendant's] interpretation of . . . section 11372.7 would lead to absurd consequences by reading out of that very section the fact that it is a fine and/or a penalty. So reading the statute, the trial court could not impose an otherwise mandatory penalty assessment. [The defendant's] interpretation does violence to the express language of the statute and to the clear intent of the Legislature, and would lead to an absurd result." (*Id.* at p. 1696.)

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<sup>4</sup> "Except as otherwise provided in subdivision (b) or (e), each person who is convicted of a violation of this chapter shall pay a drug program fee in an amount not to exceed one hundred fifty dollars (\$150) for each separate offense. The court shall increase the total fine, if necessary, to include this increment, which shall be in addition to any other penalty prescribed by law." (§ 11372.7, subd. (a).)

The appellate court in *Martinez, supra*, 65 Cal.App.4th 1511 applied the reasoning of *Sierra* to the crime-lab fee specified in section 11372.5, subdivision (a) (§ 11372.5(a)).<sup>5</sup> The court held: “Under the reasoning of *Sierra*, we conclude that Health and Safety Code section 11372 .5, defines the criminal laboratory analysis fee as an increase to the total fine and therefore is subject to penalty assessments under [Penal Code] section 1464 and Government Code section 76000.” (*Martinez*, at p. 1522; see also *People v. Sharret* (2011) 191 Cal.App.4th 859, 869-870 [because crime-lab fee was punitive in nature, court required to stay its imposition under Pen. Code, § 654, where related charge of which defendant was convicted was subject to being stayed]; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1257 (*Terrell*) [court required to impose state and county penalty assessments on crime-lab fee it levied]; *People v. Sanchez* (1998) 64 Cal.App.4th 1329, 1332 [holding abstract of judgment must be amended to include crime-lab fee imposed because it was “an increment of a fine”].)

In *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153 (*Talibdeen*), the California Supreme Court addressed a related question where the trial court imposed a crime-lab fee under section 11372.5(a): Does the trial court have discretion to waive penalties under Penal Code section 1464? As the Supreme Court explained, “Although subdivision (a) of Penal Code section 1464 and subdivision (a) of Government Code section 76000 called for the imposition of state and county penalties based on such a fee, the trial court did not levy these penalties . . .” (*Talibdeen*, at p. 1153, fn. omitted.) The Supreme Court, proceeding on the assumption that penalty assessments applied to a crime-lab fee under section

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<sup>5</sup> “Every person who is convicted of a violation of [any of 28 specified statutes, including section 11378] shall pay a criminal laboratory analysis fee in the amount of fifty dollars (\$50) for each separate offense. The court shall increase the total fine necessary to include this increment. [¶] With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court shall, upon conviction, impose a fine in an amount not to exceed fifty dollars (\$50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law.” (§ 11372.5, subd. (a).)

11372.5(a), concluded that the trial court was required to impose penalty assessment on such fee at the time of sentencing. (*Talibdeen*, at p. 1157.)<sup>6</sup>

Defendant asserts that *Talibdeen* is not controlling “[b]ecause the Supreme Court never decided the issue presented here—whether the crime[-]lab fee or drug program fee is a ‘fine’ subject to penalty assessments.” We disagree, following the conclusion and adopting the reasoning of the Fourth District Court of Appeal, Division One, which recently held that crime-lab fees and drug program fees were subject to penalty assessments: “[I]n our view, we are governed by *Talibdeen*’s legal determination that the penalty is mandatory, even if the *Talibdeen* defendant did not specifically raise the issue presented here. [Citation.] . . . In reaching its conclusion, the *Talibdeen* court said it was following the lower court decisions, including *Martinez* [*supra*, 65 Cal.App.4th 1511] and *Terrell* [*supra*, 69 Cal.App.4th 1246], each of which analyzed the specific issue before us (the applicability of the statutory penalties to the laboratory fee and/or drug program fee) and each of which decided that the penalty statutes did apply to these particular fee statutes. (*Talibdeen*, *supra*, 27 Cal.4th at p. 1157; [citations].) Because the holdings of these Court of Appeal decisions constituted the logical predicate to the high court’s ultimate conclusion on the mandatory nature of the penalty as applied to a section 11372.5 assessment, we necessarily conclude they were encompassed within the *Talibdeen* court’s holding. [Citation.] If the high court had intended to disavow the *Sierra*, [*supra*, 37 Cal.App.4th 1690], *Martinez*, and *Terrell* holdings on this issue or suggest it was not reaching the propriety of these rulings, it could have said so. It did not.” (*People v. Alford* (2017) 12 Cal.App.5th 964, 974-975 (*Alford*).)

Assuming we are we not bound by the Supreme Court’s decision in *Talibdeen*, the decision is, at the very least, dictum of considerable persuasiveness here. (See *Hubbard v.*

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<sup>6</sup> Under a narrow exception, however, the trial court may waive such penalties under Penal Code section 1464, subdivision (d), if the defendant is in the midst of serving a sentence imposed because he failed to pay a fine. (*Talibdeen*, *supra*, 27 Cal.4th at pp. 1154-1155.)

*Superior Court* (1997) 66 Cal.App.4th 1163, 1169 [appellate court’s should follow Supreme Court dictum where high court “has conducted a thorough analysis of the issues [or the dictum] reflects compelling logic”].) And even were we to conclude that we are free to find that crime-lab fees and drug program fees are not subject to penalty assessments—as urged by defendant—we decline to do so.

As noted above, defendant relies on *Vega, supra*, 130 Cal.App.4th 183 and *Watts, supra*, 2 Cal.App.5th 223 in support of his position that the court’s imposition of penalty assessments upon crime-lab fees and drug program fees was improper. The court in *Vega* addressed whether section 11372.5’s crime-lab fee, which facially applies to violations of sections 11351 and 11352, also applies to conspiracy to commit said crimes. It stated that since conspiracy is punishable to the same extent as the underlying crime (Pen. Code § 182, subd. (a)), if section 11372.5’s fee is actually a fine (i.e., punishment), it also applies to conspiracy to commit any of the crimes specified in section 11372.5. (*Vega*, at p. 194.) The court in *Vega*—offering no discussion of *Sanchez* or *Sierra*—held that the crime-lab fee is not punishment for purposes of Penal Code section 182, subdivision (a). (*Vega*, at pp. 193-195.) It reasoned that “the main purpose of . . . section 11372.5 is not to exact retribution against drug dealers or to deter drug dealing . . . but rather to offset the administrative cost of testing the purported drugs the defendant transported or possessed for sale in order to secure his [or her] conviction.” (*Vega*, at p. 195.) But in so holding, the court recognized that “[a] cogent argument can be made from the language of . . . section 11372.5, subdivision (a) [that] the Legislature intended the \$50 laboratory ‘fee’ to be an additional punishment for conviction of one of the enumerated felonies.”

In *Watts, supra*, 2 Cal.App.5th 223, the court concluded that section 11372.5’s crime-lab fee did not constitute a fine or penalty upon which penalty assessments must be imposed. In parsing the language of section 11372.5(a), the court rejected “the rationale of *Martinez, Sierra* [and] the courts that have followed them, under which section 11372.5(a)’s references to the phrases ‘total fine,’ ‘fine,’ and ‘any other penalty’ somehow establish that

the crime-lab fee constitutes a ‘fine’ or penalty within the meaning of the statutes governing penalty assessments. As to the statute’s reference to ‘total fine,’ we fail to perceive how the fact that the crime-lab fee increases the ‘total fine’ necessarily means the fee itself is a ‘fine’ subject to penalty assessments. Nothing about the statute’s use of the phrase ‘total fine’ is inconsistent with the conclusion that the crime-lab fee simply gets added to the overall charge imposed on the defendant after penalty assessments are [established]. And as to the statute’s references to the word ‘fine’ and the phrase ‘any other penalty,’ they appear only in section 11327.5(a)’s second paragraph, which applies only to offenses ‘for which a fine is not authorized by other provisions of law.’ ” (*Watts*, at p. 234.) The *Watts* court also relied on *Vega*’s reasoning that “the crime-lab fee . . . is a fixed charge that is ‘imposed to defray administrative costs,’ not ‘for retribution and deterrence.’ [Citations.]” (*Watts*, at p. 235, quoting *Vega*, *supra*, 130 Cal.App.4th at p. 195.)

While we agree with *Vega*’s conclusion that one of the purposes of section 11372.5 is “to offset the administrative cost of [suspected contraband] testing” (*Vega*, *supra*, 130 Cal.App.4th at p. 195), the fact that the Legislature, in enacting a statute, may have had multiple purposes, one of which being to defray administrative costs, does not transform an otherwise penal statute into one that is nonpunitive. (See *People v. High* (2004) 119 Cal.App.4th 1192, 1198-1199.) We thus disagree with defendant that *Vega* is dispositive. (See *Alford*, *supra*, 12 Cal.App.5th at p. 977 [holding that fact that there may be budgetary reasons for levies under §§ 11372.5 and 11372.7, as well as punishment and deterrence objectives, does “not evidence a legislative intent to *exempt* assessments imposed under either [statute]”].)

Further, we—in line with recent decisions of the Third District Court of Appeal (*People v. Moore* (2017) 12 Cal.App.5th 558 (*Moore*))<sup>7</sup> and the Fourth District Court of

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<sup>7</sup> Defendant relied on the decision of the appellate division of Nevada County Superior Court holding that neither crime-lab fees nor drug program fees were subject to mandatory penalty assessments. (*People v. Moore* (2015) 236 Cal.App.4th Supp. 10.) That

Appeal, Division One (*Alford, supra*, 12 Cal.App.5th 964)—decline to follow the court’s holding in *Watts*. As the *Moore* court observed: “The original version of section 11372.5 relied upon but not quoted in *Watts, supra*, 2 Cal.App.5th 223 . . . provided: ‘Every person who is convicted of a violation of [specified statutes] shall, *as part of any fine imposed*, pay an increment in the amount of fifty dollars (\$50) for each separate offense. The courts shall increase the total fine necessary to include this increment. [¶] With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court may upon conviction impose a fine in the amount of fifty dollars (\$50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law.’ [Citation.] [¶] The *Watts* court’s analysis implies that under the 1980 version of section 11372.5 the criminal laboratory analysis fee *was* a fine or penalty. (*See Watts, supra*, 2 Cal.App.5th at p. 235.) However, the deletion of the phrase ‘as part of any fine imposed’ does not establish legislative intent to transform a fine or penalty into a nonpunitive fee, particularly where the last sentence of each of the two paragraphs in subdivision (a) of section 11372.5 has remained largely the same. Accepting the *Watts* court’s premise that the 1980 version of section 11372.5 enacted a fine or penalty compels the conclusion the levy under that section is still a fine or penalty.” (*Moore*, at pp. 569-570; see also *Alford, supra*, 12 Cal.App.5th at p. 974 [“[a]lthough *Watts*’s analysis was thoughtful and comprehensive, we are not persuaded by its ultimate conclusion”].)

The court in *Moore* reasoned further that “a conclusion the criminal laboratory analysis fee is not subject to penalty assessment would render th[e] sentence [at the end of the first paragraph of § 11372.5(a), ‘shall increase the total fine necessary to include this increment’] mere surplusage.” (*Moore, supra*, 12 Cal.App.5th at p. 570.) *Moore* concluded that “*Watt* also too easily dismisses the second paragraph of section 11372.5, subdivision (a) . . . [, which] states the trial court shall impose a \$50 levy ‘which shall be in addition to any

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decision, as noted by defense counsel in a supplemental letter, was recently reversed in *Moore, supra*, 12 Cal.App.5th 558.

other *penalty* prescribed by law’ even for ‘those offenses specified by this subdivision for which a *fine* is not authorized by other provisions of law, which shall constitute the increment prescribed by this section.’ (§ 11372.5, subd. (a), italics added.) The purpose of the second paragraph is irrelevant if the criminal laboratory analysis fee is not subject to penalty assessments. Where *Watts, supra*, 2 Cal.App.5th 223 must ‘differentiate’ between paragraphs of the same subdivision to account for ‘internal inconsistency’ (*Watts*, at p. 231), we determine all of subdivision (a) to be in harmony with a purpose to impose a fine or penalty. Our conclusion means there is no language in the subdivision that serves as a mere nullity.” (*Ibid.*) Lastly, the *Moore* court emphasized that “the Legislature, which is presumed to be aware of longstanding judicial interpretations of [a] statute [citation], has not amended section 11372.5 to abrogate the holding the section constitutes a fine or penalty in the nearly two decades since the decision in *Martinez, supra*, 65 Cal.App.4th at pages 1520-1522.” (*Id.* at p. 571.)

In conclusion, we hold that crime-lab fees under section 11372.5(a) and the drug program fees under section 11372.7(a) are subject to mandatory penalty assessments under Penal Code section 1464 and Government Code section 7600. We follow the Supreme Court’s decision in *Talibdeen, supra*, 27 Cal.4th 1151 concerning crime-lab fees and rely also upon the majority of decisions by intermediate appellate courts (discussed above) similarly holding that such levies under sections 11372.5(a) and 11372.7(a) are subject to the imposition of penalty assessments.

#### DISPOSITION

The judgment of conviction is affirmed.

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Bamattre-Manoukian, J.

WE CONCUR:

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Elia, Acting P.J.

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Mihara, J.

*People v. Kurtz*  
No. H043729